

COMMUNITIES OF KERUNANG AND ENTAPANG

Complainants

-and-

ROUNDTABLE FOR SUSTAINABLE PALM OIL

Respondent

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**SPECIFIC INSTANCE**

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## I Introduction

1. This is a complaint by two Dayak Hibun communities in West Kalimantan, Indonesia (“the Communities”). It is made against a regulatory body called Roundtable for Sustainable Palm Oil (“RSPO”) under Chapter IV of the OECD Guidelines 2011 edition.
2. The Communities’ complaint is that RSPO has failed
  - (1) in breach of Chapter IV(3) to “seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts”; and/or
  - (2) in breach of Chapter IV(5) to “carry out human rights due diligence as appropriate to [its] size, the nature and context of [its] operations and the severity of the risks of adverse human rights impacts”.
3. Both complaints arise out of the actions of PT Mitra Austral Sejahtera (“PT MAS”), which is or was until recently a wholly owned subsidiary of a Malaysian MNE called Sime Darby Berhad (“Sime Darby”). The Communities allege that PT MAS and Sime Darby have unlawfully excluded them and threaten to continue to unlawfully exclude them from their traditional lands, so that they can continue to be used for palm oil. As a result the Communities have been and/or will be denied their fundamental human rights.
4. The Communities first tried to engage Sime Darby in the resolution of those issues when it acquired PT MAS in 2006, but did not get very far. In 2012 they referred the dispute to RSPO<sup>1</sup>, but in the 5 years that have passed since then have made no more progress than they had in the 6 years before that.

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<sup>1</sup> See the letter of complaint dated 31 October 2012 in the bundle.

5. The Communities contend that RSPO could and should have assisted them to recover their lands and/or to mitigate the adverse impact on them of PT MAS operations, but that it has consistently failed to do this. In particular RSPO
  - (1) has failed to take any or any effective steps to ensure that the complaints made by the Communities under the RSPO complaints procedure are determined within a reasonable period
  - (2) on the contrary, has certified Sime Darby as compliant with RSPO Principles and Criteria (“RSPO Criteria”) when in fact its dealings with the Communities were not and are still not compliant; and by these and other means
  - (3) has thereby encouraged Sime Darby and PT MAS in the belief that they can delay any effective resolution of the Communities’ claims for a protracted period with little or no risk to their commercial interests or reputation.
6. In short the Communities contend that RSPO has failed to comply with its own rules and procedures, and that as a result of this failure it has also fallen seriously short of what the Communities were entitled to expect of it under the OECD Guidelines.
7. So far as we are aware this is the first Specific Instance to have been filed against a regulatory agency, but RSPO is as much a Multinational Enterprise as any other. It would be ironic if a body which is supposed to ensure that oil palm producers respect the rights of project affected communities could not be held to account when it fails to respect those rights itself. If this was the case, MNEs in certain sectors of the economy might be encouraged to use certifying organisations like RSPO to provide a regulatory fig leaf for poor practice.
8. The “human rights” which the Communities seek to protect include their rights to a family life and to practice their cultural traditions and their religion, as well as the right not to be arbitrarily deprived of their property.

9. At the core of the dispute, however, is the Communities' right as indigenous peoples to require that third parties use or occupy their traditional lands only with their free, prior and informed consent (or "FPIC"). This right is explicitly recognised both by the OECD Guidelines and the RSPO rules.<sup>2</sup>
10. We have referred to these rules below as briefly as possible, but had to look at them in a little detail because they provide the best evidence of what RSPO can reasonably be expected to do to safeguard the rights of project affected communities, and are therefore also cogent evidence of what can reasonably be expected of RSPO under the OECD Guidelines. The more evident the failure of RSPO to comply with its own rules, the more likely it is to have also fallen short of the Guidelines.
11. The relevant RSPO rules are included in a bundle of documents attached to this Specific Instance, together with other key material. Rather than drown the National Contract Point in paper, however, we have omitted a large number of other documents which are important but not crucial to an understanding of the case. These can be provided on request.
12. We have also included in the bundle a brief chronology which should make it easier to follow the sequence of events.

## **II Purpose of Specific Instance**

13. The Communities' ultimate goal is the restitution of the lands taken from them, rather than compensation for their loss. They know that the RSPO can do much to help them achieve this goal, if only it can be persuaded to give their case the priority it deserves.<sup>3</sup>

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<sup>2</sup> See below

<sup>3</sup> See for example the February 2017 decision of the RSPO Complaints Panel, in which a palm oil subsidiary of Wilmar International Ltd was found to have obtained land in West Sumatra from the indigenous Kapa community without following the proper legal process. The Panel ruled that the disputed land should be re-measured for development approval with better community participation, and that the subsidiary should renegotiate the terms for planting oil palm on community land. Wilmar has recently withdrawn an appeal against this ruling.

14. The Communities respectfully ask the NCP to admit their complaint for further consideration, and to use its good offices to help them negotiate with RSPO a plan of action to ensure that this happens. The plan should identify the various steps which still need to be taken to resolve the Communities' complaint to RSPO, and impose a strict time limit for each of these steps. Only a plan endorsed by RSPO is likely to offer the Communities the protection they need, because only this will be enforceable against Sime Darby by one or more of the mechanisms discussed below.
15. The Communities do not believe that they are bound by the "permission" they granted PT MAS in 1997 to plant palm oil on their land for 25 years, because this was obtained on the false premise that on the expiry of that period PT MAS would return the land to them. Their first priority, however, is to ensure that they do at least recover their land in 2022, and this should be the aim of the plan of action.
16. In principle the communities are prepared to grant PT MAS a limited permission to continue to cultivate oil palm thereafter, but only on terms that secure their customary rights and ensure that the land will in due course revert to the Communities. Some form of participatory mapping is likely to form part of the plan.
17. The Communities do not expect the NCP to involve itself
  - (1) directly in the merits of their claim to recover the land now occupied by PT MAS, although they believe their claim to be an extremely strong one. The RSPO Complaints Panel will have to decide the merits, even if at present it appears unable or unwilling to explain when, how or even whether it is prepared to do this; or
  - (2) in their claim that PT MAS and Sime Darby have failed to deliver the services promised to the Communities in 1997 under a so-called

“Partnership Scheme”. Further efforts will be made to resolve these claims in separate negotiations with Sime Darby.

### **III The Communities**

18. The Communities belong to the Dayak Hibun tribe and number about 500 people. They live in the hamlets of Kerunang and Entapang in Bonti Sub-District. Bonti Sub-District is part of Sanggau District in West Kalimantan, which is the westernmost province of Indonesian Borneo. Both hamlets are located within an area of about 1,462 hectares which PT MAS has converted to an oil palm plantation (“the Disputed Land”).<sup>4</sup>The tribes have probably lived on this land for more than 300 years and still make up the bulk of the population.<sup>5</sup> Most of the newcomers in the area are company workers.
19. Land ownership among the Dayak is not based on individual titles but on use. For many generations land rights have been determined by the cultivation of land for agricultural crops and by the memories of village elders. Rules about the allocation and transfer of land are passed down orally, from one generation to the next. Land is allocated not only for cultivation but for sacred sites, burial grounds and other common purposes.
20. Dayak customary law also recognises “derasa”, a concept which enables the community to “let” its land to a “tenant” for a limited period in return for “rent” in one form or another. Derasa does not permit the permanent transfer of land rights to a third party, because this would run counter to the principle that Dayak land does not belong to the current generation but to all those which follow.
21. There are many sacred sites within the Disputed Land where prayers are offered up and rituals performed. These include Pedagi Abae Pengehan

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<sup>4</sup> See the maps included in the bundle.

<sup>5</sup> Interviews conducted during a field study in 2012 confirmed that both PT MAS and the district authorities acknowledge that the Communities held customary rights over the Disputed Land prior to the grant of HGV rights to PG MAS. See the Investigation Report included in the bundle

Agung, Nek Hatu Ayu and Abae Luncak Luncik. Ancestral spirits are believed to inhabit all of these sites, as well as a mass graveyard at Kubur masal Pulau Batongk, and smaller graveyards at Kubur Pulau Mojik and Kubur Tak Klotok. Land is also set aside for traditional gardens and other common purposes.

22. The loss of access to any of these sites would have a deeply unsettling effect on the Communities. PT MAS operations already disrupt cultural festivals like the *Gawai tutup tahun semangat padi* and the *pantang akhir tahun paska panen padi*, which celebrated different stages in the paddy season.<sup>6</sup> The Communities were not informed that the temporary permission that they had (they thought) given to PT MAS would be used in this way, and had not agreed that it could be.
23. The Communities have lobbied RSPO for the return of the Disputed Land at every annual Roundtable since 2007, at first with the support of an NGO called Sawit Watch. Since 2013 they have been assisted by another NGO called Transformasi untuk Keadilan INDONESIA, which campaigns to reduce the human cost of large scale palm oil exploitation.<sup>7</sup>
24. TuK INDONESIA has helped the Communities to draft this Specific Instance, translated it into the local Indonesian language and discussed at length it with the core members of the two Communities. Representatives of both Communities have signed the final version to signify their approval of its contents.

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<sup>6</sup> Many more details of the disruption which PT MAS has brought to the Communities and their way of life can be provided on request. This disruption is a prima facie breach of Article 27 of the CPR Covenant.

<sup>7</sup>The bundle includes an analysis of the conflict produced by TuK in 2013 which illustrates the extent of its involvement over the years.

#### IV PT MAS and the Disputed Land

25. PT MAS is an Indonesian company formed in 1996 by the merger of a Malaysian company with an Indonesian partner which had already obtained a location permit over the Disputed Land. This permit allows a company a limited period in which to persuade those who claim adverse rights over the land to release or surrender them to the company on agreed terms.
26. Indonesian law allows a company to apply to the National Land Agency for a Hak Guna Usaha or “HGU” certificate only if it produces written releases to show that the land is now vacant and free from encumbrances.<sup>8</sup> The HGU is granted for an initial term of 25 or 35 years but is usually extended for a further 25 years thereafter.
27. PT MAS failed to obtain the written releases over the Disputed Land that the law required of it, but in 2000 was still able to persuade the Land Agency to grant it an HGU certificate for some 8,741 hectares.<sup>9</sup> The HGU will apparently continue until 2030, and covers the Disputed Land as well as parts of Kerunang, Entapang and other hamlets.<sup>10</sup>
28. In a further contravention of the law the certificate failed to distinguish the “core” estate granted to PT MAS from the small holdings or “plasma” estates to which local people should have been - but were not always- given individual land titles. The EIA was issued by the Ministry of Forests and Plantations rather than the Ministry of the Environment, in yet another breach of the regulations.<sup>11</sup>
29. PT MAS and Sime Darby now say that when the current or any extended HGU comes to an end the Disputed Land will have to be delivered up to the State,

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<sup>8</sup> Government Regulation Number 40 of 1996 on Right to Cultivate, Right to Build, and Right to Use over Land. Location permits expressly provide that “The acquisition of land should be made directly amongst the concerned parties through sale and purchase or release of land executed prior to creation of sale and purchase deed before PPAT or release of land certificate before the local PPAT by granting compensation that forms and amount are determined by consensus.” The “PPAT” is the land registrar.

<sup>9</sup> Field research has confirmed that no one from the Communities appeared before the PPA officer to sign a written release: Investigation Report, op cit., note 5

<sup>10</sup> Decision Letter of Head of National Land Agency No. 23/HGU/2000

<sup>11</sup> Government Regulation No 27 of 1999

and that it has therefore been lost to the Communities forever. Their members will apparently not even have the right to remain in their own homes if they fall within the boundaries of the HGU grant - as many do.<sup>12</sup>

30. The Communities did not know any of this when they reached their “agreement” with PT MAS in 1997. They did not even know what an HGU was. The word “agreement” is placed within inverted commas because PT MAS put nothing in writing with which the Communities could agree or disagree, and because there was no meeting of minds between the parties. There was therefore no true agreement at all.
31. The Communities were told nothing about an HGU certificate, or the effect that the issue of a certificate to PT MAS would have on their legal rights. They believed that they had made only a *derasa* arrangement to rent land to the company for 25 years, in return for a one off payment of IDR 50,000 per hectare and a promise of roads, schools and other services. IDR 50,000 is less than US\$4.
32. The idea that they would virtually give away their only real asset, the Communities say, is simply unthinkable – as PT MAS must have been very well aware at the time. That is almost certainly why it concealed from the Communities its intention to apply for an HGU certificates, and the effect this might have on their customary rights.
33. The Communities have been deprived of their land by deceit.

## **V Sime Darby**

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<sup>12</sup> This is because an HGU certificate can only be granted over land that belongs to the State, in accordance with Basic Agrarian Law No. 5 of 1960 and Government Regulation No. 40 of 1996

34. Since its acquisition of PT MAS in 2006, the Communities have addressed their claims primarily to Sime Darby Berhad. Sime Darby is incorporated in Malaysia, is listed on the Kuala Lumpur Stock Exchange, and is effectively controlled by the Malaysian Government.
35. The company is a founder member of RSPO and is represented on its Board of Governors. By 2016 it had a market capitalization of some US\$ 11.7 billion, with palm oil only one of several sectors in which it is heavily involved.<sup>13</sup>The Annual Report for 2017 confirms that about 98% of the company's palm oil production of 2.43 million metric tonnes is currently RSPO certified, and implies that this figure would be 100% were it not for the controversy that continues to surround PT MAS.<sup>14</sup>
36. Sime Darby's Human Rights Charter includes a strong commitment to the principle of free, prior and informed consent (FPIC).<sup>15</sup>The company has claimed to support the Communities' claim that their lands should be returned to them.

## VI RSPO

37. RSPO is registered in Zurich under Article 60 of the Swiss Code (which is why this Specific Instance has been lodged in Switzerland). It was established in 2004 and now has over 2000 members world-wide. Its headquarters are in Kuala Lumpur, but it has a branch office in Brussels able to participate in any mediation or conciliation that the NCP may propose.

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<sup>13</sup> A demerger in later November 2017 transferred the palm oil business to a stand-alone entity named Sime Darby Plantation, which is now the world's largest producer of palm oil. Some 97% of the 3 million metric tonnes that it produces every year is certified by RSPO.

<sup>14</sup> The 2017 Report notes that "Notwithstanding unresolved legacy claims by the Project Affected Communities against PT MAS) in West Kalimantan, Sime Darby Plantation remains committed to achieving 100% RSPO certification."

<sup>15</sup> "We uphold the process of Free, Prior and Informed Consent and recognise that the local communities have the right to give or withhold their consent to proposed projects that may affect the lands they own, occupy or otherwise use."

38. RSPO has described itself as:

a global, multi-stakeholder initiative on sustainable palm oil. Members of RSPO, and participants in its activities come from many different backgrounds, including plantation companies, manufacturers and retailers of palm oil products, environmental NGOs and social NGOs and from many countries that produce or use palm oil.<sup>16</sup>

The principal objective of RSPO is “to promote the growth and use of sustainable palm oil through co-operation within the supply chain and open dialogue between its stakeholders”.<sup>17</sup>

39. More specifically, the aim of the leading players who founded the organisation has been to counter the view that palm oil poses a major threat to tropical forests and the people who live in it. As RSPO itself has put it:

There is in an ever-urgent need and growing global concern that commodities are produced without causing harm to the environment or society. RSPO certification is an assurance to the customer that the standard of palm oil production is sustainable. Palm oil producers are certified through strict verification of the production process to the stringent RSPO Principles & Criteria for Sustainable Palm Oil Production by accredited Certifying Bodies, and can be withdrawn at any time in case of infringement of the rules and standards.<sup>18</sup>

### *RSPO Certification*

40. Certification is crucial to RSPO members, not only because of the CSPO premium and other benefits that it attracts but because of the assurances it offers the end customer. Correspondingly, the loss of a certificate can cause significant reputational damage. A member can lose certification for all its operations if even one of certified “management units” fails to comply with RSPO standards, which may in turn lead to the loss of many or all of its high volume buyers.

### *Principles & Criteria*

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<sup>16</sup> <https://rspo.org/about/how-we-work>

<sup>18</sup> <https://rspo.org/certification/how-rspo-certification-works>

41. Under the RSPO's Principles & Criteria ("RSPO Criteria") members must comply with a number of basic principles to obtain certification. Particularly relevant for present purposes are Principles 2 and 6, under which a producer must
- (1) comply with "all applicable local, national and ratified international laws and regulations" [2.1]. The "international laws" include the Civil and Political Rights Covenant, which Indonesia has ratified, and the UN Declaration on the Rights of Indigenous Peoples, of which Indonesia is a signatory [see Annex 1 to the RSPO Criteria]<sup>19</sup>
  - (2) demonstrate its "right to use the land" for which it holds a concession, and that its right is not legitimately contested by local people who can demonstrate that they have legal, customary or user rights." [2.2]
  - (3) not be involved in a "significant land conflict", unless requirements for acceptable conflict resolution processes are implemented and accepted by the parties involved.[2.2.4]
  - (4) not use the land for oil palm so as to diminish the legal, customary or user rights of other users without their free, prior and informed consent [2.3]
  - (5) prove that the legal, economic, environmental and social implications for permitting operations on their land have been understood and accepted by affected communities, including the implications for the legal status of their land at the expiry of the company's title, concession or lease on the land [2.3.2(c)]
  - (6) demonstrate its "responsible consideration of communities affected by growers and mills" [6]; and
  - (7) respect human rights [6.13].

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<sup>19</sup> Article 7(2) of Law No 39 of 1999 provides that international human rights instruments ratified by Indonesia form part of domestic law

### *Partial certification*

42. Under the RSPO Certification System (“Certification”) if an RSPO member is a majority shareholder in a company which owns a management unit that does not currently satisfy the RSPO Criteria, it can obtain “partial” certificates to cover other units that do satisfy the Criteria provided that
- (1) it submits an acceptable “time bound plan” to bring the uncertified unit up to RSPO Criteria standards within a specified period<sup>20</sup>; and that in the meantime
  - (2) any land conflict that may have arisen in relation to the uncertified unit is “being resolved through a mutually agreed process”<sup>21</sup>
  - (3) any “legal non-compliance” is “being resolved in accordance with the legal requirements, with reference to RSPO criteria 2.1 and 2.2”<sup>22</sup>

### *Complaints System*

43. The RSPO Criteria go on to provide that where it is not possible to resolve a dispute under 6.3.1 “complaints can be brought to the attention of the RSPP complaints system.” This, it is claimed, “aims to provide a fair, transparent and impartial process to duly handle and address complaints against RSPO members or against the RSPO system itself.”
44. RSPO has published few details on how this aim is supposed to be achieved. There is no reference at all to a complaints system in either the Statute or the Membership Rules, and a complaints flowchart provides only a very general outline.
45. According to the flowchart, within one month of its receipt of a complaint an RSPO Complaint Panel (or “CP”) has to decide whether the complaint is “legitimate.”<sup>23</sup> If it is, certification is to be put “on hold” while investigations are

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<sup>20</sup> RSPO certification system 2007 edition par 4.2.4(b)

<sup>21</sup> *Ibid.*, para 4.2.4(f)

<sup>22</sup> *Ibid.*, para 4.2.4(h)

<sup>23</sup> RSPO Complaints procedure flowchart:

<https://www.rspo.org/publications/download/f98ecfd5a03c72d>

made and the panel consider the member's response to the complaint. The panel is to produce a decision within 4 weeks, to which the parties are to have another 4 weeks to respond.

46. If the parties accept the CP's decision it produces an action plan to which the parties are invited to agree. If they do, the implementation of the agreed plan is to be monitored. One option is to refer the dispute to mediation under the auspices of an RSPO Disputes Settlement Facility (or DSF).
47. The system is administered by the RSPO Secretariat, but an independent review commissioned by RSPO reported in 2014 that

There have been many concerns with the Secretariat staff. The most common issue raised is insufficient personnel and capacity to deal with the volume and complexity of complaints. Overall, there is a very low rate of complaint resolution and a significant backlog of unresolved complaints, many of which were submitted more than a year ago and some more than three or four years ago.

Contributing factors include lack of proactivity and long delays in communication between the Secretariat and complaints parties (with facts having changed in some cases). There seems to be a correlation between increasing numbers of complaints and an increasing proportion of open complaints, at least in part due to the complexity of outstanding cases.

Other concerns raised include: lack of transparency in the Secretariat's handling of complaints, including determination of validity and procedure; inadequate or unprofessional communication with complaints parties and the general public; and unclear parameters and expectations of the Complaints Coordinator(s), including vis-à-vis the Complaints Panel and complaints parties

... serving as a Panel member demands a significant time commitment and is a relatively thankless task. The Secretariat has accordingly found it difficult to build a large and diverse enough pool of capable and willing Panel members.

48. The review concluded that:

Although several important changes have been introduced, the Secretariat faces a significant backlog of unresolved complaints (including several longstanding), the limited pool of Complaints Panel members are overburdened, and complainants and responding RSPO members alike have fundamental concerns with transparency, independence, efficiency, accessibility, and procedural consistency. There is no functioning monitoring

system (either for individual complaints or for adherence of the Secretariat and Panel to state procedures), little to no internal reflection or analysis of lessons learned, and multiple loopholes between different RSPO components, including the critically important accreditation and certification system. In addition to failing to fulfil Principle 31's effectiveness criteria, the overall picture is one of growing frustration and declining trust in the Complaints System, which in turn affects confidence in RSPO as a whole.<sup>24</sup> [Emphasis added]

49. The “effectiveness criteria” are laid down by Principle 31 of the UN Guiding Principles on Business and Human Rights, which specifies that non-judicial mechanisms should be “legitimate”, “accessible”, “predictable”, “equitable”, “transparent” and “rights compatible.”
  
50. In particular a mechanism is only
  - (1) predictable, if it provides “a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation”
  
  - (2) equitable, if it seeks to “ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms”
  
  - (3) transparent if it “keeps the parties to a grievance informed about its progress, and provides sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake”
  
  - (4) rights compatible if it “ensures that outcomes and remedies accord with internationally recognized human rights.”
  
51. As RSPO has attempted to handle the complaint filed by the Communities against PT MAS, the failure of the RSPO complaints mechanism to satisfy any of these criteria has become all too evident. This criticism is amplified in Section VIII below.

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<sup>24</sup> Jonas, A Review of the Complaints System of the Roundtable on Sustainable Palm Oil (December 2014)

## VII Sime Darby Certificates

52. Palm oil grown on the Disputed Land has remained uncertified, of course, because of the continuing controversy about the methods used by PT MAS to acquire the land. Between 2012 and 2017, however, RSPO has continued to certify or re-certify all other palm oil produced by Sime Darby.
53. RSPO was entitled to do this only if throughout the period RSPO Certification 4.2.4(b), (f) and (h) had been satisfied. But none of them have been satisfied, as should have been obvious to RSPO.

### *Certification 4.2.4(b)*

54. In the years that followed its purchase of PT MAS in August 2007, the Communities tried to engage with Sime Darby and its subsidiary on the unlawful “acquisition” of the Disputed Land and other issues. This was initially done through a working group named Tim Kerja Perwakilan Petani (“TKPP”) in which Kerunang, Entapang and other local villages met with representatives of PT MAS to address their differences.
55. In October 2013, however, the Communities decided to withdraw from TKPP, in part because the other villages did not want to recover their old lands and therefore had a very different agenda. The Communities’ attempts to negotiate directly with Sime Darby and/or PT MAS achieved very little. Sime Darby and PT MAS have elected to focus instead on their discussions with the depleted TKPP
56. Since their withdrawal the Communities have had no further involvement with TKPP and have not participated in any other “time bound plan”. There has therefore been no time bound plan applicable to the Communities for more than 4 years. No alternative plan has been proposed to the Communities by either Sime Darby or PT MAS.

57. It is difficult to see Sime Darby could have come up with a plan, given that this would have had to show how within a specified period of time PT MAS
- (1) could now comply with “applicable national laws and regulations” which it had broken many years earlier, and when it had made no effort to rectify the breaches in the meantime (Criterion 2.1)
  - (2) could demonstrate a “right to use” the Disputed Land which the Communities could not legitimately contest, when the Communities could and did contest this right to the hilt and the CP had specifically accepted that their complaint was “legitimate” (Criterion 2.2),
  - (3) had put in place and implemented a conflict resolution process acceptable to the Communities to resolve a “significant land conflict”, when it had not in fact established or implemented any such process (Criteria 2.2.4)
  - (4) had obtained the Communities’ FPIC, when it palpably had not [Criterion 2.3]; or
  - (5) could prove that the Communities had understood the legal and other implications of the company’s operations on their lands, and in particular “the implications for the legal status of their land at the expiry of the company’s concession or lease, when they manifestly had not done so (Criterion 2.3.2(c))
58. The fact that Sime Darby might have found it difficult or impossible to formulate an acceptable time bound plan does not, of course, mean that it was thereby released from Criteria 4.2.4(b). It means that unless and until Sime Darby found a solution to the problem, none of its other managed units should have been certified or recertified. On the contrary, their certificates should have been suspended or withdrawn.
59. This is the combined effect of Certification 4.2.4(d) and 4.2.4(j). The first subparagraph provides that if an RSPO member “systematically” fails to proceed

with the implementation of a time bound plan, as Sime Darby has plainly done in this case, a “major non-compliance” must be “raised.” The second provides that “the current certification assessment cannot proceed to a successful conclusion until the major non-compliance is addressed.”

60. No major non-compliance appears to have been raised against Sime Darby, for reasons which have yet to be explained. As a result the assessments of Sime Darby certifications have been able to proceed as normal.

*Certification 4.2.4(f)*

61. The conflict over the Disputed Land is not “being resolved through a mutually agreed process”, or by any process at all. The Communities have not agreed any process with Sime Darby or PT MAS to resolve their claim to the Disputed Land.
62. Even if PT MAS could somehow be taken to have “agreed” that the Communities should file a complaint against it under the RSPO mechanism (which it did not), it could only be said that the dispute was “being resolved” so long as active steps were being taken to resolve the complaint within a reasonable period.
63. In fact, as is shown below, by 2016 the Communities’ complaint had fallen into a deep state of torpor from which it has yet to emerge.

*Certification 4.2.4(h)*

64. So far as the Communities are aware, Sime Darby has made no attempt to resolve the “legal non-compliances” which PT MAS committed when it acquired the Disputed Land, whether in accordance with RSPO criteria 2.1 and 2.2 or at all.

*Sanction*

65. Under Certification 4.2.4(k), a failure to address the requirements of either 4.2.4(f) or (h) “may lead to certification suspension(s) (consistent with RSPO Certification document rules on no-compliance.” So far as the Communities are

aware, however, the RSPO has yet to consider whether it ought to suspend Sime Darby's certifications on either ground.

### VIII 2012 Complaint to RSPO

66. Frustrated by the lack of progress in their discussions with Sime Darby, in October 2012 the Communities lodged a formal complaint against PT MAS under the RSPO mechanism.<sup>25</sup>The complaint asked the DSF to assist in the resolution of various problems to do with the Partnership Scheme and the company's failure to deliver the services it had promised, but asked the CP to decide for itself their claim to customary rights over the Disputed Land.
67. Although the RSPO has ruled that the complaint is "legitimate", in the 5 years or more that have elapsed since the complaint was lodged Sime Darby or PT MAS have never been required to provide a definitive response to the allegations which the Communities have made against them (of deceit, and of violation of the applicable laws and regulations).
68. It is almost two and a half years' since Sime Darby's filed its last report to RSPO on the "progress" of the complaint.<sup>26</sup> At about the same time the Communities submitted detailed Proposals for a Solution to resolve the complaint to which the company has never responded. As the complaints process has dragged on, the CP has made a mockery of the RSPO flowchart and the timetable it has tried to introduce.
69. One of several problems has been that the RSPO chose to ignore the Communities' request that the DSF should deal only with partnership issues, which the Communities were prepared to refer to mediation. They did not want the DSF to mediate their claim to land rights, on which they see no need to compromise. They wanted the CP to rule on the merits of this claim one way or the other; as has already been noted, they are confident of the merits.

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<sup>25</sup> See the bundle.

<sup>26</sup> A copy of this report is also in the bundle

70. The RSPO decided, however, to shunt the entire complaint off to the DSF, which was able to achieve virtually nothing. More than two years were wasted on correspondence and occasional, inconclusive meetings with the DSF. In the meantime the CP sat on its hands and did nothing.
71. By February 2017 the Communities had lost patience, and asked the DSF to refer the dispute to the CP for a “swift deliberation”. It took the DSF another 3 months to write to the CP, and the complaint was not formally transferred until June 2017.
72. This was despite the fact that it was now known that Sime Darby planned to sell its stake in PT MAS. If the purchaser is not a member of RSPO, and not therefore subject to its standards, procedures or sanctions, the ability of the Communities to obtain an effective remedy for the wrongs done to them might be seriously compromised. As the DSF itself put in its letter to the CP:
- In light of the new development where Sime Darby intends to sell the concession, this case is in dire need for an urgent and ultimate solution. Therefore, the DSF Advisory Group cannot stress more the importance of having this matter solved as soon as possible. It is also to consider that as Sime Darby aims to sell the concession while leaving the dispute unresolved and consequently have this issue dragged on by the new owners, we recommend the CP look into measures to ensure Sime Darby holds true to settle this dispute first, in good faith - in accordance with the RSPO Criteria and Code of Conduct.
73. It is difficult to know whether this letter had any effect. The CP has met on several occasions since it was written, but if the complaint against PT MAS was discussed at any of these meetings there is no mention of it in the published minutes.
74. In August 2017, however, TuK INDONESIA itself wrote to the CP, urging it to direct Sime Darby not to sell PT MAS until the Communities’ complaint has been resolved. An RSPO Case Tracker indicates that the letter may have been discussed at a CP meeting a few days later, and that it eventually led the CP in early October to “issue a response on Sime Darby’s plans to divest its operations”.

75. Two months later, and more than six months after the DSF had spoken of the “dire need for an urgent and ultimate solution”, the Communities still do not know what this “response” was, or whether Sime Darby has been asked not to divest itself of PT MAS until the dispute has been determined; or if it has, whether Sime Darby has acceded to the request.
76. Both the Communities and TuK INDONESIA have been left entirely in the dark about this important issue, and about the progress of the complaint generally. They still do not know when, whether or how the CP intends to proceed. The RSPO complaints mechanism has shown itself to be about as far removed as it is possible to get from the “legitimate”, “accessible”, “predictable”, “equitable”, “transparent” and “rights compatible” mechanism that the Communities were entitled to expect.

## **IX Application of OECD Guidelines**

### *A multinational enterprise*

77. The explicit references to the UN Guiding Principles on Business and Human Rights in the 2014 review of the RSPO complaints mechanism, in the RSPO Criteria themselves and in other RSPO literature all plainly acknowledge that the RSPO is a business and a “multinational enterprise”. This is confirmed by the fact that, in the year to 30 June 2017, the organisation generated an income of just under \$10 million from membership fees and supply chain contributions.
78. Chapter 1(4) states that the Guidelines apply to “enterprises in all sectors of the economy”, which clearly includes the regulatory sector to which RSPO belongs. Comment 6 on Chapter 1 says that “Governments wish to encourage the widest possible observance of the Guidelines”. Comment 37 on Chapter IV states that the human rights principles apply to all enterprises “regardless of their size, sector, operational context, ownership and structure.”

*Chapter IV(3)*

79. Chapter IV(3) clearly applies to RSPO because:

(1) The issue or refusal of certificates is a “business operation”. So is the operation of a complaints mechanism.

(2) The issue of a certificate to a member despite its failure to respect the human rights of a community affected by its project will be “directly linked” to an adverse human rights impact on the community, because it will encourage the member to think that it can ignore those rights without risk of sanction; if it is still able to sell certified product, its incentive to prevent or mitigate an adverse impact will largely disappear.

A failure to operate the complaints mechanism properly will have a very similar effect as long as the failure persists.

(3) By the same token if the RSPO fails to suspend or withdraw the certificate of a non-compliant member until it mends its ways, or to investigate a community complaint in a proper and timely manner, it fails to “seek a way to mitigate” the adverse impact of the member’s conduct.

(4) The organisation is clearly in a “business relationship” with its members, which have agreed to pay a membership fee and to abide by the RSPO rules in exchange for the benefits of membership.

80. Chapter IV(3) is of course directed at MNEs which do not themselves have an adverse impact on communities but are able to use their leverage over other MNEs which do. As the Commentary notes:

Meeting the expectation in paragraph 3 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact. ‘Business relationships’ include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services.

Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts. [Emphasis added]

81. For the reasons already explained the RSPO manifestly has “leverage” over recalcitrant members, both through its complaints mechanism and its certification process. Indeed, its very *raison d'être* is to exercise this leverage so as to ensure that “commodities are produced without causing harm to the environment or society.”

#### *Chapter IV(5)*

82. In the words of Commentary 14 on Chapter IV, a failure properly to operate the certification process or complaints can “facilitate or incentivise” an adverse human rights impact by an RSPO member. It follows that Chapter IV(5) expects the RSPO to exercise “human rights due diligence” to ensure that these processes do not themselves contribute to the adverse impact.
83. The “nature” and “context” of these operations, and the “severity” of the risk that they are intended to address, indicate that the level of due diligence to be expected of the RSPO is a relatively high one. This is borne out by the RSPO's own documents and in particular the mandatory terms of the RSPO Criteria. Even the “indicators” in the Criteria are regarded as “specific pieces of objective evidence that shall (must) be in place to demonstrate or verify that the Criterion is being met.”
84. It is therefore not open to the RSPO to assume that the systems it has put in place are fit for purpose. It must actively monitor their performance and take appropriate remedial steps if and when it becomes apparent that an adverse human rights impact is about to fall through the net. For the reasons we have given, RSPO appears not to have followed this course in the present case.

## *Human Rights*

85. The Guidelines make clear that the “human rights” which MNEs are expected to respect are to be broadly interpreted because, to quote from Commentary 40 to Chapter IV:

Enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights ... Depending on circumstances, enterprises may need to consider additional standards [i.e. beyond those established by the ICCPR and other basic human rights instruments]. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples ...

This passage is consistent with Annex 1 of the Criteria which (as has already been noted) lists UNDRIP among the “key” instruments that producers are required to respect.

86. It follows that the human rights which MNEs are expected to respect will where appropriate include the rights of indigenous peoples to their traditional territories.
87. Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, which Indonesia has also ratified, points to the same conclusion. This requires States to guarantee to everyone without distinction as to race or ethnic origin “the right to own property alone as well as in association with others.” It is now 20 years since the Committee on the Elimination of All Forms of Racial Discrimination confirmed that States must therefore:

recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not

possible, the right to restitution should be substituted by the right to just, fair, and prompt compensation<sup>27</sup>

88. The Committee has gone on to hold that States must also recognise indigenous land tenure systems, even if they have not been formally recognised, and that their failure to do so constitutes racial discrimination.<sup>28</sup>

89. The FPIC Guide to RSPO members which the Board of Governors has recently incorporated into the RSPO Criteria takes a similar approach, particular on the possible return of land to indigenous communities:

Where compensation is agreed as part of the [process to resolve a land dispute] it is important that monetary compensation not be taken as the default mode of compensation. Communities may choose other forms of compensation including restitution of lands, assistance with land titling, changed terms of land rental or lease, restoration of damages and rehabilitation of degraded habitat, allocation of smallholdings, as well as compensation through the provision of services, infrastructures or other assistance.<sup>29</sup>

## X Initial Assessment

90. In order to decide whether the issue raised in a Specific Instance merits further examination, the NCP has to determine whether the issue is *bona fide* and relevant to the implementation of the *Guidelines*, and for this purpose is expected to take various factors into account.<sup>30</sup> We comment briefly on each of these below, but hope that the *bona fides* of this Specific Instance is not in doubt.

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<sup>2727</sup> General Recommendation XXIII: Indigenous Peoples, CERD, U.N. Doc. A/52/18, Annex V; CERD/C/51/Misc.13/Rev.4, para. 4(d) (1997).

<sup>28</sup> The Committee has urged Canada, for example, to “facilitate the establishment of proof of Aboriginal title over land in procedures before the courts”: Concluding observations: Canada, UN Doc, A/57/18 (2002), at para. 330

<sup>29</sup> The quotation is from the 2015 FPIC Guide, but the 2008 Guide which it replaced was expressed in similar terms: “Plantations which have not respected communities’ land rights, which have not respected the right to Free, Prior and Informed Consent and where there are ongoing conflicts are not certifiable under the RSPO standard. How can this be sorted out? In line with international law ... in such a situation indigenous peoples have rights to redress, to restitution of their lands and to compensation for damages.”

<sup>30</sup> Commentary on the Procedural Guidance for NCPs, para 25

*Identity of the party concerned and its interest in the matter*

91. No one has a closer interest in what happens to the Disputed Lands than the Communities. See in particular sections III, IV and VII above

*Whether the issue is material and substantiated*

92. The issues we have raised are highly material for the reasons given in section IX. They have been substantiated in sections IV, VII and VIII in particular.

93. If necessary the Complainants also contend that the allegations summarised in section IV are, in effect, substantiated by the failure of Sime Darby or PT Mas to adduce any evidence to refute them.

94. They have known for years, for example, of the allegation that they failed to obtain written releases before they acquired the Disputed Land. If they had been able to produce these releases and thereby refute the allegation, it is inconceivable that they would not have done so several years ago.

*Whether there seems to be a link between the enterprise's activities and the issue raised in the Specific Instance*

95. There is the clearest possible link, for the reasons set out in sections VI, VII and VIII

*The relevance of applicable law and procedures, including court rulings*

96. We have identified the relevant law and procedures in sections IV and VI. We have referred briefly in Section II paragraph 12 to the only directly relevant ruling of which we are aware

*How similar issues have been, or are being, treated in other domestic or international proceedings*

97. See paragraph 85.

98. Perhaps the most significant international litigation in which a similar issue has been treated recently treated is the Endorois case, in which the African Human

and Peoples Rights Commission ruled that an indigenous community which has unwillingly lost possession of its lands, even when those lands have been lawfully transferred to innocent third parties, is in principle entitled to their restitution.<sup>31</sup>

*Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines*

99. The abuse of human rights which has accompanied the growth of the oil palm industry is well known. RSPO is intended to offer a serious response to this problem, and where it works properly NCPs will no doubt be very reluctant to intervene. But if and when it fails the communities which look to it for protection, NCPs ought to afford a remedy of last resort. That is what they are there for.
100. The admission of this Specific Instance for further consideration will not open the sluice gates to a host of other complaints, because complainants will still have to show a “direct link” between the operations of the MNE and an adverse impact on their human rights. It will, however, allow the Communities and RSPO to use the good offices of the NCP to facilitate a proper dialogue about the present impasse and how to resolve it.
101. The Communities are confident that this will happen if and when RSPO is persuaded to give this case the attention it deserves. They believe that the admission of the Specific Instance for further consideration will have precisely this effect.
102. As we have said, the Communities would hope to agree their own “time bound” plan of action with RSPO to ensure that their complaint is decided within a specified period, and that proper consideration is given to the suspension of Sime Darby certifications in the meantime.

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<sup>31</sup>Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication 276/2003. The decision was adopted by the African Commission in May 2009 and approved by the African Union at its January 2010 meeting. The decision was adopted by the African Commission in May 2009 and approved by the African Union at its January 2010 meeting. More recently, the principle of restitution was applied in the 25 November 2015 decision of the Inter-American Court of Justice in Kalina and Lokano Peoples v Suriname.

103. A different plan may be required if Sime Darby has now sold PT MAS to another company which is not a member of RSPO. We will put forward other proposals if this should prove to be the case, but it would be premature to explain these until we know the current ownership of PT MAS.

Signed on behalf of the Communities of Kerunang and Entapang by

19 January 2018